88-1737

APR 24 1989

JOSEPH F. SPANIOL, JR.
CLERK

Case No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ELMER R. BARBEE

PETITIONER

VS

THE UNITED STATES

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

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5 cy pd

Questions Presented

A. When the Inspector General of the Army, the appropriate authority, as per Fausto, states that an unwarranted personnel action has been taken, and that the head of the agency has violated procedural regulations, does 32 USC 709(e)(5) bar a suit for back pay?

B. Does the current interpretation by the lower courts of 32 USC 709 (e)(5) allowing no appeal, administrative or judicial, beyond the adjutant general, conflict with Technician Personnel Regulation 752 page 13, paragraph 2-19, C,(2), which identifies this appeal to be admininstrative?

C. Does the inclusion in 32 USC 709(f) of 5 USC 2108, the definition of a veteran, disabled veteran and a preference eligible, strip an honorably discharged veteran of all the rights and benefits given to him by Congress during a period of employment as a National Guard Technician?

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CASES

United States vs. Fausto

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STATUTES

Technician Personnel Act, 32 USC 709

10 USC 3039

10 USC 3040

SECRETARIAL REGULATIONS

INSPECTOR GENERAL ACTIVITIES AND PROCEDURES

AR 20-1, June 15, 1978, Paragraph 1-12, 3-3e, and 3-13 TECHNICIAN PERSONNEL REGULATION,

DISCIPLINE AND ADVERSE ACTION TPR 752.23 February 1987, Paragraph 2-19 C (2)

OTHER SOURCES

ARTICLE I Section 8 of the Constitution

ARTICLE III Section 2 of the Constitution

TENTH AMENDMENT of the Constitution

Complaint for Disciplinary Action by Office

of the Special Counsel

Department of the Army, Office of the Inspector General

Letter dated 7 March 1989

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

Petitioner, Elmer R. Barbee, respectfully pray that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit entered in the above-entitled cause on January 27, 1989.

I.

OPINIONS BELOW

The opinions of the United States Claims Court, and the United States Court of Appeals for the Federal Circuit are Appendixes A and B respectively. The Office of the Special Counsel, Complaint for Disciplinary Action against Major Leslie T. Everett is Appendix C. The findings of the Department of the Army, Office of the Inspector General, is Appendix D.

II.

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit was decided on January 27, 1989, and this petition was filed within 90 days of that date. The jurisdiction of this court is invoked pursuant to 28 USC 1254(1).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides:

> "To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

(Emphasis added to pertinent section)

Article III. Section 2 of the United States Constitution provides:

> "The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their

authority: - to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; - to all controversies between two or more states, between a state and citizens at another state; - between citizens of differenct states; - between citizens of the same statee or the citizens thereof, and foreign states, citizens or subjects."

(Emphasis added to pertinent section)

The Tenth Amendment of the United States Constitution provides:

"The powers not delegated to the United States by the Constitution, not prohibited by it to the states. are reserved to the states respectively, or to the people."

(Emphasis added to pertinent section)

SECRETARIAL REGULATION INVOLVED

The INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, Army Regulation 20-1 paragraph 1-12 provides:

"In elimination actions under AR 635-100 or AR-635-200 or other adverse personnel action, such as a derogatory OER requiring referral to the rated officer, relief from duties, official reprimand, where there are no other sufficient records, a commander or head of an agency proposing to use an Inspector General record in support of such

action will identify that portion of the record which the commander or agency head proposed be used by the elimination board or by the command in other adverse personnel actions, and will coordinate with the office of the Inspector General prior to initiation of action."

(Emphasis added to pertinent section)

The INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, Army Regulation 20-1 paragraph 3-3e provides:

"Any type of disciplinary or other adverse action against an individual for registering a complaint, except as provided for in paragraph 3-4, is prohibited."

The INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, Army Regulation 2-1 paragraph 3-13 provides:

"Prohibitions. Department of the Army personnel are prohibited from restricting in any manner any individual form registering a complaint or cooperating with an Inspector General. Moreover, once an individual has submitted a complaint or cooperated with an Inspector General, Department of the Army personnel are prohibited from initiating any type of disciplinary, adverse or other action against that individual solely because of the complaint or cooperation rendered the Inspector General. The only exception is described in paragraph 3-4."

(Emphasis added to pertinent section)

TECHNICIAN PEPSONNEL REGULATION 752, DISCIPLINARY AND ADVERSE ACTION, paragraph 2-19, c, (2) provides:

> "....that in accordance with 32 USC 709e (5) there is no further administrative review of the State Adjutant General's final decision."

(Emphasis added to pertinent section)

STATEMENT OF FACTS

In October 1979, Major Elmer R. Barbee, a veteran and a GS-12, North Carolina Army National Guard Civil Service Technician registered complaints with the Inspector General under Army Regulation 20-1, dated June 15, 1978. Those complaints registered were against Major Leslie T. Everett, (Barbee's first level supervisor) and LTC Bruce C. Guard, (Barbee's second level supervisor). As a result of Barbee's complaints to the Inspector General, LTC Guard received a one week's suspension.

On February 22, 1980, Major Everett proposed Barbee's removal from his civil service position for making false statements during the Inspector General Investigation. Barbee submitted a reply stating that he made no false statements to the Inspector General and that the proposed removal action was a violation of Inspector General regulation AR 20-1. Barbee was removed from employment on April 11, 1980.

A Civil Service Hearing was conducted and still no false statments were presented. The Agency stated only that the comlaints rendered were unsubstantiated, and therefore false. The Civil Service Hearing Officer sustained the removal action. On November 6, 1980, the North Carolina National Guard, Adjutant General, MG William E. Ingram, ruled the removal action as appropriate and final.

On June 10, 1982 Barbee complained to the Office of the Special Counsel (OSC) that he was terminated from his National Guard Technician position because he was a whistle blower. The OSC conducted in investigation into Barbee's 1979 Complaints to the Inspector General and filed a Complaint for Disciplinary Action for violation of 5 USC 2302 (b)(9). Reprisal for Exercise of Appeal Rights. The North Carolina Attorney General's Office requested dismissal of the complaint for lack of jurisdiction citing 32 USC 709

(Technician Personnel Act) as reserving the disciplining of National Guard Technicians to the state adjutants general. On June 18, 1985, the MSPB dismissed the action stating that only the State Adjutant General could discipline technicians.

On April 7, 1986, Barbee filed suit against the United States in the United States Claims Court (Case No. 230-86c) for back pay and expenses under the Back Pay Act citing Tucker Act jurisdiction. The United States moved for dismissal upon the basis that The United States Claims Court lacked subject matter jurisdiction to entertain the action bacause Barbee's exclusinve right of appeal was to the Adjutant General of North Carolina pursuant to 32 USC 709 (e)(5). Barbee argued that 32 USC 709 (e)(5) referred to administrative appeal only, citing Technician Personnel Regulation 752, paragraph 2-19, C, (2), not legal suits filed in courts.

At the request of the United States, the United States Claims Court delayed ruling on Barbee's suit for almost one year awaiting the Supreme Court decision on Fausto. The United States Claims Court dismissed Barbee's suit stating that in accordance with United States v. Fausto No. 86-595 decided January 25, 1988, that it lacked the jurisdiction to hear plaintiff's claims.

On July 22, 1988, Barbee filed an appeal with the United States Appeals Court for the Federal Circuit, Case No. 88-1374, using the investigation by the Office of the Special Counsel and Complaint for Disciplinary Action as appropriate authority for a suit for back pay to lie. Barbee also requested the Department of the Army, Office of the Inspector General to rule as to whether Secretarial regulations were violated by the agency in proposing Barbee's removal. The Office of the Inspector General delcined comment

because the question posed was a matter of litigation. The United States argued that Barbee was not a preference eligible (veteran) citing 32 USC 709(f) and that a judication should be denied pursuant to 32 USC 709(e)5.

Barbee argued that 32 USC 709(f) denied veterans only the five point preference upon initial employment and veteran's preference in reduction-in-force procedures as explained in the legislative history of the Act. Congress did not intend to deny an honorably discharged veteran his traditional right to go to court as a result of a Civil Service adverse personnel action. Barbee also argued that to allow a state appointed Adjutant General who has violated Secretarial regulations and procedures to be the final appeal of a federally funded agency violates Article I, Section 8 of the Constitution. Barbee further argued that the court was the appropriate authority to resolve

Constitutional questions and not to allow the court to do so pursuant to 32 USC 709(e)5 would be a violation of not only Article III, Section 2, but also possibility the Tenth Amendment. The Constitutional arguments were not addressed by the lower courts. The United States Court of Appeals for the Federal Court denied Barbee's appeal on January 27, 1989.

On March 7, 1989, the Department of the Army, Office of the Inspector General provided Barbee a letter stating that the North Carolina National Guard had no basis for administering an adverse action against him. The Office of the Inspector General also stated that the proposal of an adverse action was in violation of Secretarial regulation AR 20-1, dated June 15, 1978. Barbee then submitted a motion to the US Court of Appeals for the Federal Circuit to rehear his case on this new evidence stating that now Barbee vs. The United States conforms with the appropriate

authority as defined in The United States vs. Fausto to allow a suit of back pay to lie. The Clerk of the US Court of Appeals for the Federal Circuit rejected Barbee's motion.

V.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO DECLINEATE ON THE BOUNDARIES OF JURISDICTION OF THE ADJUTANT GENERAL, SET FORTH IN 32 USC 709.

The United States Claims Court misstated the facts of the case, in that it failed to acknowledge that the complaint rendered an Inspector General was the basis for Barbee's removal. The United States Claims Court also failed to acknowledge Barbee's exact employment under 32 USC 709. Although Barbee was an excepted service employee, most of provisions of the Civil Service Reform Act of 1978 are not applicable to National Guard Technicians. National Guard Technicians are governed by

regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be and those regulations are administered by the state appointed Adjutant General. National Guard Technicians are considered employees of the Department of the Army or the Department of the Air Force and of the United States and, thus are those employees in the service of the United States as provided in Article I, Section 8 of the Constitution. The United States Claims Court cited the United States v. Fausto, 108 S. Ct. 668 (1988) as grounds to dismiss Barbee's suit for back pay.

In Barbee's appeal, The United States Court of appeals for the Federal Circuit held that in United States v. Fausto, 108 S. Ct. 668 (1988), the Civil Service Reform Act repealed any previously existing Tucker Act jurisdiction to entertain suits based on unwarranted removal of all excepted service employees. The Supreme Court went into great detail explaining how the Civil

Service Reform Act applied to employees such as Fausto; however, most of those provisions of the Civil Service Reform Act are substituted by Secretarial Regulations in the employment of National Guard Technicians.

Secretarial regulation, TPR 752 identified the word "appeal" as used in 32 USC 709(e)5 as being an administrative review therefore not barring judicial review of a suit for back pay. This was not addressed in the lower court's decision. The United States Court of Appeals for the Federal Circuit did not address Barbee's argument that Barbee's supervisor nor the Adjutant General could remove Barbee as a reprisal action for "whistle blowing" as found by the Office of the Special Counsel.

The application of Fausto by both lower courts in Barbee's case as a National Guard Technician is expanding the Fausto decision beyond those areas defined by the Supreme Court.

B. THE LETTER DATED MARCH 7, 1988 FROM THE OFFICE OF THE INSPECTOR GENERAL SHOULD SURFICE AS APPROPRIATE AUTHORITY TO ALLOW A SUIT IN THIS CASE FOR BACK PAY TO LIE.

All of those powers granted the State Adjutant General in 32 USC 709 are subject to Secretarial regulations. Army Regulation 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES is a Secretarial regulation that is binding on the National Guard Technicians and the State Adjutant General. The letter dated March 7, 1989 states that Army Regulation 20-1 for which the Office of the Inspector General is the proponent, should not have been cited as the basis for adverse action against Barbee. It explains that there was no basis for taking disciplinary action, therefore making Barbee's removal an unwarranted personnel action, and prohibited by Secretarial regulations. It further states the agency head or Adjutant General did not follow procedures required

by paragraph 1-12 of Army Regulation 20-1.

Even though this letter was received after the United States Court of Appeals for the Federal Circuit had rendered it's opinion, and a MOTION FOR RECONSIDERATION OF JANUARY 27, 1989 DECISION BASED ON NEW EVIDENCE submitted 17 March 1989, was denied, it is clear that this letter is in accordance with Fausto, and is the "appropriate authority" stating that an unwarranted personnel action did occur. Therefore the suit for back pay should lie.

C. THE INCLUSION OF 5 USC 2108 IN 32 USC 709

(f) WAS INTERPRETED BY THE LOWER COURT AS TO STRIP VETERANS OF ALL RIGHTS BESTOWED BY CONGRESS.

The Technicians Personnel Act 32 USC 709(f)

states:

> "Sections 2108, 3502, 7511, and 7512 of title 5, do not apply to any person employed under this section."

Title 5 USC 2108 defines a veteran, a disabled veteran and a preference eligible, and was substituted in part for the first 76 words of The Veteran's Preference Act of 1944. In order for a soldier to receive any of those benefits granted by Congress to an honorably discharged veteran, he or she must by definition, meet the requirements of 5 USC 2108.

To be eligible for any of those benefits of the Veteran's Administration, (ie. Veteran's Loans, Veteran's Educational Assistance, use of Veteran's hospitals, and burial in a Veteran's cemetery), one must meet the requirments of 5 USC 2108. Barbee was an honorably discharged veteran, having served with distinction in Vietnam from September 1969 to September 1970. The inclusion of 2108 of title 5 in 32 USC 709 (f), as interpreted by the lower court, not only made him a non-preference eligible, but also a non-veteran, stripping him of all benefits and of the traditional rignt

of a veteran to go to court. This is a right that Barbee had earned from having served in combat.

Language has been included in 5 USC 2108, THE VETERAN'S READJUSTED BENEFITS ACT of 1966, and the other statutes granting veterans benefits, that make it clear that no entitlements to veteran's preference arises from service under the provisions of section 511(d) of Title 10, United States Code, pursuant to an enlistment in the Army National Guard or the Air Force National Guard or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve.

Considering that National Guard Caretakers, as National Guardsmen were on extended tours of duty, for training purposes only, with the Army for longer that 180 consecutive days during the Vietnam era, it is understood that legislation had to be clear that they were

not entitled to Veteran status. National Guard Caretakers prior to the 1968 Act were state employees, and so were therefore not entitled to veteran status or veterans preferences. This language was carried over from the old state Caretaker status with the passing of 32 USC 709, the National Guard Technician Act of 1968. In studying the Legislative history in House Report No. 1823 reprinted in 1968 U. S. Code, Congress and Administrative News, it is clear that Congress only intended to deny veterans the five point preference in reduction-in-force procedures. It was not intended that veterans employed as National Guard Technicians be placed in the same class as those who never served their country in time of war. The Fausto decision addressed three classes of Civil Service employees; the competitive, the preference eligible excepted (veteran) and the non-preference eligible excepted (non-veteran). This new interpretation

by the lower court would create a fourth class of employee, that being a on-preference eligible excepted (veteran). This interpretation in effect, places Barbee in the same status as a dishonorably discharged veteran.

D. THE CONSTITUTIONAL PROVISIONS OF THIS CASE COULD BE INTERPRETED AS MANDATING JUDICIAL REVIEW OR REMOVAL ACTIONS TAKEN AGAINST NATIONAL GUARD TECHNICIANS.

Article I, Section 8 of the United States Constitution reserves for governing such part of the militia as may be employed in the service of the United States, to the federal government. National Guard Technicians as of 1968 were employees of the Department of the Army and of the United States and therefore come under this governing provision. A state adjutant general is a state appointed or state elected official and acts as an agent fo the United States when administering to those National Guard Technicians under 32

USC 709. If the state adjutant general violates those Secretarial regulations prescribed, he is outside of his jurisdiction.

Article III, Section 2 of the Constitution gives to the courts the judicial power over all cases in law and equity arising under the Constitution, and the laws of the United States.

In that Congress clearly established in 32 USC 709(e) 3 that National Guard Technicians could only be removed for cause, and Barbee was removed by the Adjutant General in violation of Secretarial regulation, without cause, then one of the powers reserved to the United States and prohibited by it to the states, under the TENTH AMENDMENT of the Constitution, was violated. This would give cause for that individual to have a suit arising under the Constitution.

VI

Conclusion

Barbee's removal was based solely on complaints rendered the Inspector General and so therefore, the Department of the Army, Office of the Inspector General is the "appropriate authority" to state that Barbee suffered an unwarranted personnel action. In accordance with the United States vs. Fausto, a suit for back pay will lie.

Secretarial regulaton, TPR 752, paragraph 2-19,c,(2) identifies the "appeal" in 32 USC 709(e) 5 as being an administrative review, and so does not bar a judicial suit as interpreted by the lower courts.

The inclusion of 5 USC 2108 in 32 USC 709(f) as interpreted by the lower courts essentially down grades an honorably discharged veteran, who has been unlawfully removed, to that status of a soldier who has dishonorably discharged, leaving him

with no recourse to clear his name.

This case presents important Constitutional and regulatory questions regarding the exact boundaries of the State Adjutant General in the administering of 32 USC 709 and Secretarial regulations as they apply to National Guard Technicians. This Court has the opportunity to clarify the exact status of veterans serving as technicians, and the benefits they retain, and the exact boundaries placed on the Adjutant General by Secretarial regulations and 32 USC 709.

Respectfully submitted,

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Dated April 24, 1989

CERTIFICATE OF SERVICE

I hereby certify under the penalty of perjury that on this 24th day of April 1989, I caused to be placed in the United States mail (first-class, postage prepaid) copies of Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT addressed as follows:

JOHN S. GROAT, ATTORNEY
Department of Justice
Commercial Litigation Branch
ATTN: Classification Unit
2nd Floor, Todd Building
Washington, D.C. 20530

24 April 1989

Elmer R Barbee
ELMER R. BARBEE

ATTORNEY, PRO SE

In the United States Claims Court

No. 230-86C

(Filed: March 3, 1988)

ELMER R. BARBEE, Plaintiff, v. THE UNITED STATES, Defendent.	Jurisdiction; U.S. Fausto, claim for back pay, excepted service employee; due process; tortious conduct actionable in Claims Court; civil rights claim; statutory claims not mandating compensation.

Elmer R. Barbee, Wash., D.C., pro se, for plaintiff.

John S. Groat, with whom were Asst. Atty.

Gen. Richard K. Willard, David M. Cohen, and Thomas W. Petersen, Wash., D.C., for defendent.

OPINION

SMITH, Chief Judge.

This case comes before the court on plaintiff's request for judicial review of an administrative decision by the Adjutant General off the North Carolina Army

National Guard. Plaintiff's complaint alleges wrongful termination based on both substantive and procedural grounds. The Government has not responded by way of answer but has moved for dismissal of plaintiff's complaint for lack of jurisdiction.

Facts

Plaintiff, Elmer R. Barbee, was a pilot with the North Carolina Army Aviation Facility from 1973 to 1980. Plaintiff's difficulties arose with North Carolina Army National Guard when his first level and second level supervisors refused to reissue his flight clearance. This flight clearance was an essential condition of his employment.

On October 16, 1979, plaintiff appealed his supervisor's refusal to the Adjutant General. The Adjutant General determined that although plaintiff's general allegations had some merit, they were insufficient to overturn

his supervisors' decision. On February 22, 1980, plaintiff's first level supervisor sought plaintiff's removal. The Adjutant General sustained the action, and on April 11, 1980, plaintiff was officially discharged.

On April 7, 1986, plaintiff filed a complaint with this court for damages in the amount of 1.5 million dollars in which he alleged several violations of his rights. First, plaintiff contends that the required procedures followed under the Technician Personnel Pamphlet, which were designed for his protection, constituted nothing but a pro forma undertaking since his supervisors were intent on his removal regardless of what those procedures revealed. Plaintiff secondly contends that his first level supervisor downgraded his performance ratings and proposed his removal as retaliation for plaintiff's appeal of that

supervisor's decision not to reissue his flight clearance. Plaintiff's third contention pertains to the Adjutant General's alleged bias against plaintiff. Plaintiff's fourth contention is that the Adjutant General's suggestion to plaintiff that he seek psychiatric counseling on his own initiative was in violation of the Rehabilitation Act of 1973. Plaintiff's last contention is that his civil rights were infringed because of an alleged conspiracy between the Adjutant General and his supervisors.

Discussion

In plaintiff's complaint, in which he requested damages in the amount of 1.5 million dollars, he failed to specifically allocate the damages amongst his separate claims. However, it is not possible that the total 1.5 million dollars of damages sought can relate exclusively to the back pay claim since plaintiff earned a step 4,

GS-12 salary, and the time period in question only dates back to 1980. Therefore, this court can readily assume that some portion of plaintiff's 1.5 million dollar claim relates to the other contentions plaintiff raises in his complaint.

Plaintiff's claims, other that the back pay claim, are clearly not within this court's jurisdiction. These claims are based on allegations of tortious conduct, violations of due process and other civil rights, and violations of statutory law.

It is clear that private parties cannot bring an action before the Claims Court sounding in tort. E.g., Shanbaum v. United States, 1 Cl. Ct. 177, 197 n.3 (1982), aff'd without op., 723 F 2d 69 (Fed. Cir. 1983); McClary v. United States, 775 F.2d 280, 282 (Fed. Cir. 1985). Yet, this is not to say that an action is beyond the bounds of this court "simply because

elements of tort are present in the claim." Burtt v. United States, 176 Ct. Cl. 310, 314 (1966) (per curiam). For example, this court has jurisdiction over takings claims under the Fifth Amendment, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), even though those cases may entail the tortious element of trespass. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (takings claim arising from a law requiring a landlord to provide access to cable television workers). The court may additionally review actions involving elements of tort where the action may be brought as a breach of contract. Gregory Lumber Co. v. United States, 9 Cl. Ct. 503 (1986), or where the action involves elements of tort that tive rise to a claim based upon a contract implied-in-fact. See Kirkendall v. United States, 90 Ct. Cl. 606, 31 F. Supp 766 (1940) (plaintiff has a right to a refund

of its money wrongfully taken and applied to a third party's taxes). Nevertheless, even though some tortious conduct can be brought before the court as discussed above plaintiff's tort claims cannot be construed so as to provide this court with jurisdiction since they do not raise contractual, constitutional or statutory claims over which we do have jurisdiction.

Plaintiff's constitutional claims must also be dismissed. While this court, like all federal courts, is a guardian of the due process clause, it does so in different contexts. See .g., Carruth v. United Sttes, 224 Ct. Cl. 755 (1977) (per curiam). Plaintiff's civil rights claims arise from statutory law, but those claims are, nevertheless, outside of this court's jurisdiction as well. E.g., Alabama Hospital Assoc. v. United States, 228 Ct. Cl. 176, 656 F. 2d 606, cert. denied, 496 U.S. 943 (1982). Williams v. United

States, 212 Ct. Cl. 544 (1976).

As for plaintiff's allegations relating to statutory violations of 5 U.S.C. 702, 2302(b)(9), 4302, 7511 (1982), and of 29 U.S.C. 791 (1982), plaintiff should be reminded that not every statutory claim gives rise to money damages unless the statute "in itself...can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." United States v. Testan, 424 U.S. 392, 403 (1976) (quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl., at 599, 607, 372 F. 2d, 1002, 1008-1009) (1967). None of the statutes raised by plaintiff can be interpreted to mandate compensation.

Plaintiff's main claim is for back pay. See generally 5 U.S.C. 5596 (1982). Most such claims are normally brought before the Merit Systems Protection Board, but plaintiff, an excepted service

employee). Now, however, in light of the recent Supreme Court decision in United States v. Fausto, No. 86-595 (U.S. January 25, 1988), it is clear that the Claims Court also lacks jurisdiction to review plaintiff's appeal for back pay. This court lacks jurisdiction even though palintiff has no alternate remedies available. Speaking to this exact point in Fausto, the Court noted of the Civil Service Reform Act:

> In the context of the entire statutory scheme, we think it displays a clear congressional intent to deny the excluded employees the protections of Chapter 75--including judicial review--for personnnel action covered by that chapter.
>
> Id. at 8.

Consequently, the sole remedy provided to plaintiff from the alleged administrative violations by his first and second level supervisors, was his appeal to

the Adjutant general. With that appeal having failed, plaintiff has no alternative but to end his course of litigation.

Conclusion

For the above reasons, this court finds that it lacks jurisdiction to hear plaintiff's claims. Accordingly, defendent's motion for dismissal is granted, and the Clerk is directed to dismiss plaintiff's complaint.

IT IS SO ORDERED.

No costs.

LOREN A. SMITH

Chief Judge

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS for the FEDERAL CIRCUIT

88-1374

ELMER R. BARBEE,

Plaintiff-Appelant,

v.

THE UNITED STATES,

Defendent-Appellee.

DECIDED: January 27, 1989

Before MARKEY, Chief Judge, RICH and SMITH, Circuit Judges. PER CURIAM.

DECISION

The decision of the United States

Claims court, No. 230-86C, dismissing Elmer R. Barbee's (Barbee's) complaint for lack of jurisdiction, is affirmed.

OPINION

Barbee does not contest that he was an excepted service employee and that the Supreme Court held in United States v. Fausto, 108 S. Ct. 668 (1988) that the Civil Service Reform Act repealed any previously existing Tucker Act jurisdiction to entertain removal or suspension challenges brought by such employees. It is therefore clear that the Claims Court properly dismissed Barbee's complaint.

We need not reach Barbee's argument that Fausto is inapplicable to "preference eligible veterans" because it would not help Barbee. National Guard Technicians are not "preference eligible veterans." 32 U.S.C. 709 (f) (1982), pertaining to National Guard Technicians, states that section 2108 of title 5 (defining

"preference eligible veterans") does "not apply to any person employed under this section." Pursuant to statute, Barbee's right of appeal "shall not extend beyond the adjutant general of the jurisdiction concerned." 32 U.S.C. 709 (e) (5).

The legislative history cited by Barbee in his reply to the government's response to this court's October 6, 1988 Order actually hinders his case. House Report No. 1823, reprinted in 1968 U.S. Code Cong. & Admin. News 3318, 3331, states:

> The so-called veterans' preference provisions contained in title 5, United States Code, are not presently applicable to [National Guard] technicians since they are State employees. The bill, in containing a provision making the veterans' preference provisions not applicable to technicians, will continue the existing practice on this matter.

C-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No.

SPECIAL COUNSEL,

Petitioner,

v.

LESLIE T. EVERETT

Respondent,

COMPLAINT FOR DISCIPLINARY ACTION

The Special Counsel brings this action pursuant to 5 U.S.C. 1206 (a) and (g), and the Board has jurisdiction pursuant to 5 U.S.C. 1205 and 1207.

COUNT ONE [Violation of 5 U.S.C. 2302 (b)(9) - Reprisal for Exercise of Appeal Rights]

1. Respondent Leslie T. Everett is the State Aviation Officer (Aircraft Pilot

Supervisor), GM-14, North Carolina Army National Guard (NCANG), Raleigh, North Carolina, At all times relevant to this complaint Everett served as the Facility Commander (Aircraft Pilor Supervisor), GS-13, NCANG, Raleigh, North Carolina, and had the authority to take, direct others to take, recommend, or approve personnel actions with respect to civilian technician employees of the NCANG, Raleigh, North Carolina.

2. Elmer R. Barbee was employed as an Aircraft Maintenance Officer (Pilot), GS-12, with the NCANG, North Carolina Army Aviator Facility at Morrisville, North Carolina from on or about October 7, 1978, until his removal on April 11, 1980.

3. At all times relevant to this complaint Bruce C. Guard was State Aviation Officer (Aircraft Pilot Supervisor), GS-13, and was Barbee's second-level supervisor.

4. On or about October 16, 1979, Barbee

went to the Adjutant General of the NCANG to complain that Everett, his first-level supervisor, and Guard were not assisting him in his efforts to regain clearance for flight status, an essential requirement of his job. By these actions, Barbee, in his military status, exercised an appeal right granted by the Uniform Code of Military Justice, 10 U.S.C. 938.

5. The Adjutant General directed Barbee to inform Chief of Staff Col. Earl Huie of his allegations. Barbee did so on October 18, 1979. On or about October 23, 1979, Col. Huie directed the Inspector General to investigate Barbee's allegations. Barbee, in his civilian capacity, had the right to register his complaint, orally or in writing, with the Inspector General. Army Regulation 20-1, Chapter 3, paragraph 3.

6. On or about October 18, 1979, the Adjutant General called Guard and Everett into his office, confronted them with

Barbee's allegations, and informed them that he was referring the matter to the Inspector General for investigation.

7. During late October and early November 1979, the Inspector General conducted an investigation of Barbee's allegations. The Inspector General interview Barbee, Everett and others. In addition to repeating his general complaints concerning his flight status, Barbee also disclosed to the Inspector General that Guard had been conducting private business from his office. In his November 12, 1979, report of investigation, the Inspector General concluded that Barbee's general allegations against Everett were not substantiated. He concluded that Barbee made no false statements. The Inspector General sustained Barbee's specific allegation that Guard was conducting private business on duty time. As a result of the Inspector General's findings, Guard was suspended for

the period April 20-26, 1980, for conducting personal business while on duty.

8. On December 19, 1979, Everett gave Barbee a satisfactory annual performance rating. Because Barbee had received excellent ratings for several years immediately prior to his 1979 rating, he requested an official review of the performance rating from the State Inspector Review Panel. On February 25, 1980, Everett responded to Barbee's request, and as justification for his rating of Barbee, referred to Barbee's October 1979 allegations against him which resulted in the Inspector General's formal investigation.

9. Everett has admitted that in late December 1979, he was intent on seeking Barbee's removal because Barbee made "those irresponsible statements against me and the fact that he was trying to destroy my career and my profession..."

10. On February 22, 1980, Everett proposed Barbee's removal. He gave the following reasons:

"1.....During a recent Inspector General Investigation you made false, malicious, unfounded and highly irresponsible statements against me (your supervisor) with the express intent to destroy the reputation, authority, and official standing of me in my position as facility commander.

"2. You, in a sworn statement (DA Form 3881 attached) accused me of personal harrassment against you and job imcompetence in my duties. In a thorough and impartial investigation involving sworn testimony by personnel who (sic) I assume you made against me, it was determined the charges against me were totally unsubstantiated.

"3. I consider your acts in this regard to be of the highest magnitude (sic) in your efforts to have me relieved of my job. The statement made by you to Major Owens to the effect that it looked as if you were going and you were going to take Everett and Guard with you, leaves no doubt in my mind the intent behind the charges you initiated against me.

"4. I regard your charges against me that resulted in the Inspector General investigation to be a deliberate attempt to slander me, to bring discredit to me and my position embarrass me and a flagrant gross effort to undermine my position to the absolute maximum and to create the maximum dissension possible within the AASF #1 workforce.

11. Barbee was removed on April 11, 1980, based on Everett's recommendation.

WHEREFORE, Everett violated 5 U.S.C. 2302(b)(9) in that, on or about February 22, 1980, in reprisal for Barbee's exercise of appeal rights, Everett recommended Barbee's removal. The penalties provided by law for violation of 5 U.S.C. 2302(b)(9) include removal, reduction in grade, debarment from federal employment for a period not to exceed 5 years, suspension, reprimand, or assessment of a civil penalty not to exceed $1,000.

ACCORDINGLY, the Special Counsel request that the Board find that Leslie T. Everett committed a prohibited personnel practice in violation of 5 U.S.C. 2302(b)(9) and order such disciplinary action under 5 U.S.C 1207(b) as the Board deems appropriate.

Respectfully submitted

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Washington D.C.
July 17, 1984
tc

D-1

DEPARTMENT OF THE ARMY
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C. 20310-1700

March 7, 1989

Assistance Division

Lieutenant Colonel Elmer R. Barbee
Post Office Box 130
Manchester, Kentucky 40962

Dear Colonel Barbee:

This is a final reply to your Army Inspector General Action Request of February 1, 1989. Your concerns focused on allegations of retribution, which you feel violated the June 15, 1978, version of Army Regulation (AR) 20-1.

The matters you presented were reviewed by the Chief of Investigations Division, the Inspector General Legal Advisor, and the Chief of Assistance Division. Based on the November 12, 1979, Report of Formal Investigation and the provisions of AR 20-1 in force at the time, we find that AR 20-1 (for which this agency is the proponent) should not have been cited as the basis for

adverse action against you.

You alledged that Major Leslie Everett was incompetent in his position, that he used his position to harass you personally, and that there was gross negligence on the part of Major Everett against you.

On November 12, 1979, the State of North Carolina Inspector General, Colonel Charles R. Nielsen, rendered his Report of Formal Investigation, wherein he concluded that the allegations made by you, against Major Everett, were not substantiated. However, Colonel Nielsen did not substantiate that you had made "untruthful statements" against Major Everett. Major Everett, as a result of the ROI, subsequently removed you from your duties, as cited in his "Notice of Proposed Adverse Action (Removal)", dated February 1980. The June 15, 1978, version of AR 20-1 (change 1, paragraph 3-4) states:

"Any person on duty with the Department of the Army who, under the guise of presenting a legitimate complaint to an Inspector General, knowingly makes untruthful statements will be subject to disciplinary action. The appropriate commander will be informed of the details of any such incident."

Since the Inspector General ROI contains no such determination, there was no basis for taking disciplinary action against you, under the provisions of AR 20-1. AR 20-1. AR 20-1 clearly prohibits commanders from taking adverse action against soldiers for complaining to the inspector general. Furthermore, AR 20-1, paragraph 1-12, (records release), contains the following requirement when one is under consideration for an adverse personnel action such as "relief from duties":

"... relief from duties where there are no other sufficient records, a commander or head of an agency proposing to use an Inspector General record in support of such action will identify that portion of the record which the commander or agency head proposed be used by the command and will coordinate with the Office of The Inspector General prior to initiation of action."

There is no record that the Office of The Inspector General ever received such a request for the release of inspector general records for the above stated purpose. Therefore, inspector general records should not have been used as a basis for your dismissal.

Thank you for bringing this important matter to your attention.

Sincerely,

Marcia Rinkel
Colonel, Inspector General
Chief, Assistance Division